

## **BRAND MANAGEMENT IN THE CONTEXT OF IMPLEMENTING THE „COMMUNITY TRADEMARK” CONCEPT**

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**Abstract.** *When making decisions concerning products and their brands, marketers have to take into account the politico-legislative environment. This environment consists of laws and governmental bodies which influence and limit the actions of different organisations and companies. The business legislation has developed in the course of time, making it, nowadays, possible to talk about a more significant legal component of marketing. A legal form of protection, offered by the legislative system, against unfair competition is the trade mark. The brand is a sign or a clue, which can be graphically represented, making it possible to distinguish between different similar products or services that are part of the same category, which can be registered making it possible this way for the owner to obtain exclusive rights and protection. From this perspective and also due to its capability to identify the product and its quality, the brand administration becomes an all-important marketing tool.*

**Keywords:** brand, brand protection, community trademark.

### **1. Brand concept and its functions**

Any symbol capable to define and/or fulfill an essential function of a product is a brand. For that reason, the brand concept applies to a wide range of unconventional signs such as: words (including names), drawings, letters, figures, graphic elements, tridimensional shapes and especially the shape of product or package, colour combinations or any combination of the above symbols (to the extent that the relevant legislation allows their registration as brands). The basic function of a brand is to distinguish the product (or service) of a company from other similar or identic brands of competing companies.

Of all the different approaches of brand functions we agree with that belonging to Kapferer and Laurent. According to their opinion, brands have six important functions which highlight how important brands are:

**a. Practical function**—the brand allows the consumer to memorize a previous choice making process, a more complex decision, so that if he/she is satisfied with it the consumer no longer needs to repeat the entire decision making process.

**b. Guarantee function**—the brand represents a symbol of quality for an increasingly growing part of the consumers.

**c. Personalization function**—using a certain brand allows the consumer to state his personality and originality.

**d. Ludic function**—offers the consumer a hedonic satisfaction by purchasing and using a certain brand.

**e. Peculiarity function**—the inseparability between brand and product offers a unique configuration attribute-product.

**f. Distinctive function**—the brand is often the only or most important distinctive sign which differentiates the company's product from those of the competitors (especially for homogeneous products as raw material, agricultural products, semi-finished goods etc.).

The brand that has been chosen is tested at the same time with the product. The brand testing refers to legibility, the fluency in pronunciation, memorization, the evocation capacity, estetic aspect, personality, awareness, associativity.

The producer company can choose one of the solutions:

- one brand for all products (ex. Renault);
- one brand for a product line; (ex. Gillette Mach 3);
- one generic brand plus a complement product supplement (ex. Gillette Blue II);
- one brand for one product (ex. Axion);
- distributor brand (used for free products, or in the case of hypermarkets' brands, such – Cora – „Winny” or Metro – „Aro”);
- brand absence (raw materials, agricultural products).

The first and third options insure a strong product awareness, but in case of failure they affect all the company's products. The second option is recommended when the company has several product lines and wants to clearly differentiate them (ex. For different market segments). The fourth option is recommended when the company has important financial resources and is willing to spend them in order to introduce a brand on each market segment.

In designing, finalizing and choosing the brand, it is recommended that some elementary requirements should be met:

- the brand must reflect utility, destination and product character;
- the brand must not resemble other brands;
- the brand must be a distinguished combination of syllables or letters;
- the brand must be compact, consistent, succinct, concise, simple, easy to pronounce, easy on the ear (euphonic);
- the brand must not be funny or repulsive in other languages;
- the brand must be attractive, easy to memorize, and to determine affinity.

One needs to follow several steps when creating a brand:

■ *Looking for a name.* It can be done in different ways: brainstorming, ideas associations, using specialized IT programmes (e.g. Dacia Solenza), brand banks (database). A commercial name must have several qualities: to be evocative, original, distinctive, euphonic (easy on ear), progressive, short in order to memorize it easily,

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explorable – if possible, aesthetic, available. A forestudy is highly recommended in order to check whether the desired name is already registered as a trade mark.

Besides its distinctive character that a brand must have in order to fulfill the basic condition of a trade mark—to distinguish the products or services of a company from those belonging to another company—the brand, in order to be registered, must be available, that is, it should not be registered by another competitor that carries out his activity in the same field. Exception to this rule is represented by the famous trademark which enjoys legal protection without being registered.

- *Verifying whether the brand is in compliance with legal provisions.* In order to be authorized, a brand shouldn't go against public order and good morals (for a period of time, it was thought that the name Opium, an Yves Saint-Laurent perfume goes against good morals), needs to be available and not mislead (shouldn't be treacherousness). If a brand meets these terms, it will be registered; otherwise, it will probably be rejected (there is the possibility to right of appeal). Thus, in December 1993, the Appeal Court in Paris forbade the name „Champagne” for another Yves Saint-Laurent perfume, that name being already registered.
- *Brand Legal Protection.* The legal protection is guaranteed when the brand is registered at the National Authority. The protection right (brand certificate) gives the holder an exclusive right on the brand property and a temporary exploitation monopoly, with the possibility to renew the trademark. The property right on a certain trademark allows its holder to forbid the unlawful use of his brand on the part of third parties, with the possibility to promote legal proceedings. We will return to these aspects in the 6<sup>th</sup> paragraph of the paper.

The legal protection of a brand also allows its holder the possibility to withstand any registration application that might infringe upon his/her rights. A brand holder may hire (license) or sell (transfer) the brand, depending on his/her interests in the business world.

The main purpose of brands is to differentiate and identify products. The differentiation function allows the consumer to distinguish between identical or similar products (services). The source-identifying function makes the user of the brand aware of the fact that the products manufactured by the brand holder meet his/her expectations. For consumers the brand is not the symbol per se but the symbol associated with products and services. For consumers the brand is the bond between products (services) and its holder.

The brand allows its holder, through investments in advertisement, to obtain significant prominence for the products and a build-up of trust in these products on the part of the consumers; in recognizing the brand, the buyer purchases the products and the holder can, in this way, retrieve his/her investments in quality and advertisement and increase proceeds.

A brand tells the user that the product comes from a certain source, whether it is known or not. Names or brands that are being used to identify a source can be protected as commercial trademarks and can enjoy the monopoly status. Although these

monopolies are temporarily unlimited, in terms of their purpose they are only limited to certain product categories.

Commercial trademark legislation contains the following provisions: any person who uses a word, term, name, symbol or instrument or any combination thereof for any product, service or good packages with a view to falsely identifying the source or misleading shall be sued by any person who considers to have been or is likely to be injured for that reason.

Essentially, the law says that Company B cannot use certain identification elements (colours, names, symbols) that are already being used by Company A, if such use might engender a risk of confusion or market mistake (especially on the part of consumers). The trademarks law provides solid protection and is valid as long as the product is offered for sale. Consequently, trademark is a potential continuous monopoly.

### *Extremely derived identities - illegal taking over and confusion*

Planned derived styles may be considered a fair competitive method only up to a point because of the possibility to become illegal taking-overs of some brands, which would lead consumers on a wild-goose chase.

By such an undertaking and mainly for reasons of marketing, derived identities can be used in order to draw the customers' attention to similarities to the original identity. However, this might also lead some to believe that an imitation product or service is being promoted. The solution for derived identities might be to retain the emulation status, namely, a close resemblance to the original product without, however, being mistaken for the latter, in most cases the nature of the activity carried out by the particular organisation being specified.

From a different point of view, mention must be made of the fact that a trademark holder may register more than one derivatives of the main trademark in order to protect them and does not use them until later. An example of this kind is BCR—Asigurari, BCR—Leasing or the trademarks belonging to the Transilvania Bank.

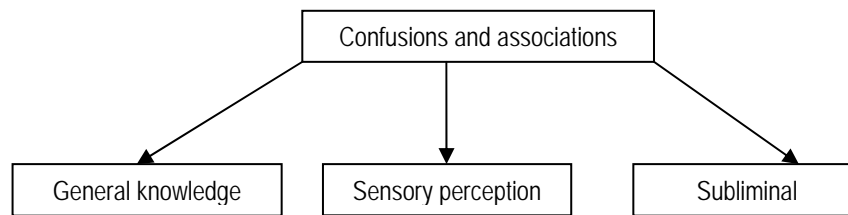
There were many cases in which a company seemed to have copied or used another company's name. Many cases of supposed identity larceny have been the subject matter of some disputes between the commercial brand owners: Dunhill&Pipe whisky brand and the Dunhill cigarettes producer; Blue Cross policlinic and Blue Cross medical insurance company; AAA insurance company and AAA automobile service company; promotional services company for VISA hotels and VISA credit card company.

This type of copying is encountered not only in the case of names but also in the case of logos, corporate colours, proprietary forms and other identification elements.

## **2. Confusion and association risks**

There are three types of confusion that a brand can generate in the minds of consumers:

- confusion pertaining to general knowledge;
- sensory perception confusion;
- subliminal confusion.



**Figure 1. Types of confusion**

General knowledge confusion refers to mistaking the meaning of a brand for another one: if the new company seems to be owned or not by the existing one or if these two companies seem to be associated in any way. Sensory perception confusion consists of a perception error. For example, a brand called „Panaosonic” has been sold in different appliances stores in New York. If the consumer does not pay enough attention he may buy products of this brand thinking he has bought the well-known brand of electronic devices, Panasonic. This error is a sensory perception confusion. Infliction of any of these two types of confusion is prohibited by law.

*Criteria used for appraisal of the confusion risk, including the association risk*

Companies are highly circumspect in their endeavour to protect their brands, identity and image. An auto parts store and a gas station which both were running under the name „Texon” were sued by Exxon in 1980. In 1986 a bakery that decided for the name „McBegel” was brought to trial by McDonald’s. Such examples could be endlessly given.

Defining confusion, on the one hand, and the correct identification of the situations in which the confusion occurs, on the other hand, are two different problems. Estimating the possibility of emergence of a confusion depends on a lot of factors and can be an extremely difficult process. For instance, the Coby headphones have entered the market in recent years, competing with the Sony brand. Both brands have four letters and there is a high phonetical resemblance between them.

What reference points will a manager appeal to in order to foresee whether the court will decide that confusions or errors may emerge? Managers may take into account seven major aspects:

- the resemblance degree between the two names, brands or other identity elements (identical or similar brands);

- the resemblance degree between product categories (identical or similar products/services);
- resemblance of advertisement broadcasting media and of distribution channels;
- the consumers' degree of interest and selection;
- proof that confusion or association exists among the consumers;
- the power of name, brand or other identity elements;
- the intention of new-comers.

The greater the resemblances between brands and within product categories, in media presentations and the commercial channels, and the lesser attention paid by consumers to the evaluation of the product or service provided, the greater the possibility of emerging a confusion. The analysis of proofs attesting confusion among consumers is surely helpful and the polls that prove its existence are regularly used in such cases. The power of identity elements and the confusion are often concurrently tested because the confusion-identifying test often needs a secondary power demonstration.

### **3. The power of name – distinctive character or secondary meaning**

The brand names can legally be classified into four general categories, each category representing differences in the power of names:

- arbitrary or eccentric names;
- suggestive names;
- descriptive names;
- generic and common names.

Arbitrary names are most easy to protect. The most powerful brands tend to be classified in the “arbitrary and eccentric” category. A name is reckoned as arbitrary if it has no bearing on the product category it belongs to. Among many others, Kodak for photos, Xerox for photocopiers, George for a magazine or Colgate for a tooth-paste could all be considered arbitrary names. These names enjoy maximum protection because they are considered to be very distinctive.

Suggestive names hint at the qualities of the product or at the associations people make with that particular product: Puffs napkins, Mr. Clean cleanser etc. Both arbitrary and suggestive names (considered by law to be inherently distinctive) enjoy greater protection than the following two categories.

Descriptive names provide information concerning the product category we deal with. Names such as „softsoap” or „TVSport” may be considered descriptive. These types of names are not protected as being inherently distinctive. For example, the Windows programme of Microsoft company was denied registration as commercial trademark under the name Windows because the name was not considered inherently distinctive. The name is not a registered trademark, however, the Microsoft company considers that it is still being protected because it acquired a secondary

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meaning—consumers only associate it with the product of the Microsoft company. To put it otherwise, the name **acquired** a distinctive character. Descriptive terms with secondary meaning can be protected (and registered). Once a marketing agent decides to use descriptive names, protection is more difficult to guarantee and can only be obtained after exclusive repeated usage.

Ultimately, generic names are those which indicate the product category we deal with. A brand name such as „catsup” for ketchup could be considered generic. Generic names do not enjoy protection because of the condition that free competition must be ensured. Ensuring a monopoly position would prevent other products or services from containing a generic term in their names.

#### *Power of the brand – trademark and other identity elements*

More and more company owners are beginning to understand that they need brands in order to raise the business value. Company transactions where brands weigh heavily are increasingly frequent. Trademark is integral part of the brand.

What is a distinctive symbol? A distinctive tracery? A distinctive colour? How can managers avoid a potential legal power of a symbol? It is much more difficult to classify symbols or other identity elements. Therefore, it is not classification but the identity „uniqueness” that the capacity of the symbols to be distinctive is decided upon. For example, the „star” symbol, which can be said to be a usual one, is used by Converse, a sports equipment producing company, and also by Texaco, gasoline producer, and Dodge, automobile producer etc.

When creating identity elements and trademarks, managers must focus on the uniqueness and complexity of their identity elements because these elements stand for a symbolic representation of all information related to a company, a product or a service. Essentially, all these make up their brand. However, even common symbols can be unique for certain product or service categories, if they are the first of the kind entering the market.

### **4. Bad faith – legal ground for canceling a trademark**

The intention of a new brand to create confusion among consumers represents, in this context, the „black sheep” and deserves careful analysis. The intention issue is actually related to equity and honesty. It is much easier for courts to forbid a certain act of imitation if it is regarded as deliberate.

According to the allegations of some courts, one may suppose that if a company attempts to copy an extant trademark in order to mislead the public, it will manage to do it in the end. Thus, when the Opium perfume brand holders of Yves Saint-Laurent sued the producers of a perfume brand called Omni, the Court of Justice and the Court of Appeal decided there were sufficient possibilities of confusion and forced the Omni company to cease the selling of the perfume in that particular form. During the appeal filed by the Omni company, the Court of Appeal noticed that Omni had copied the

commercial design of the Opium brand using, in a slogan, a direct allusion to Opium: „If you like Opium, you’ll love Omni”.

The Court of Appeal dismissed the appeal as unfounded. The judges’ analysis focused on the huge capital expenditure made by Yves Saint-Laurent for Opium brand and on imitation at international level. Such a sentence is meant to be a clear message for those who attempt to copy identities.

### 5. Brand legal protection systems

In order to plan their marketing strategy, managers must know how their brands are protected in the context of free movement of goods, by obviating the obstacle created by the principle of the territory-bound protection. Thus, the existence of an international brand registration system and the creation of the Community trademark allow a holder to avail himself of a broadened protection from a geographical point of view. In the context of trademarks harmonization is timely since it provides the framework within which brand holders can set their objectives of brand management.

At present there are three possibilities to register a brand:

- **National registration** – the applicant submits applications in each state where he/she wants protection for the brand.
- **International registration** – the applicant may register a brand by submitting an application to the World Intellectual Property Organisation in which shall be mentioned the states where protection is expected.
- **Community registration** – by submitting an application to the Office for Harmonization in the Internal Market in Alicante, the applicant may obtain registration of a trademark which shall be valid throughout the European Union territory.

### 6. Consequences of Romania’s accession to the European Union in the field of trademarks

Managers in Romania should watch out for the consequences of Romania’s accession to the European Union. Accession to the European Union has numerous advantages in this field, such as the possibility to register a brand in over 25 states by submitting a single registration application and lower expenses in promoting a brand at community level.

By registering the Community trademark a unique title is obtained, ensuring a unitary protection and producing the same effects all over the Community area. Consequently, trademark registration, transfer or abandonment will automatically impinge upon the member states of the European Union and the decisions concerning the Community trademark validity and rights will have a secondary effect.

The Community trademark protection is neither exclusive nor compulsory. Thus, the companies which are not interested in protecting their brands on the EU territory may protect their brands at national and international level as the latter is an independent protection system.



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Among the disadvantages of the Community trademark, mention should be made, in the first instance, of the fact that an automatic extension of the Community trademarks shall take place concurrently with Romania's accession to the European Union. The effects of these Community trademarks shall also be felt on Romania's territory, thus giving birth to conflicts between national registered trademarks and community trademarks. There are two conflict situations: between a previously registered national trademark and a Community trademark, on the one hand, and between a previously registered Community trademark and a national trademark, on the other hand.

In the case of the first conflict situation, the holder of the previously registered national trademark may initiate legal proceedings in Romania's courts to withstand the usage of the extended Community trademark. In the second conflict situation, the holder of the previously registered Community trademark may ask the competent court to cancel the national trademark or to deprive its holder of the rights provided by the trademark.

Trademarks and the other identity elements registered with the Romanian State Office for Inventions and Trademarks (SOIT) are only protected on the Romanian territory. Protection in a foreign country presupposes carrying out the law formalities of that particular state and observing the treaties to which the state adheres. At international level, three registration ways can be identified:

- the *national* way – pursuant to the Paris Convention for the protection of the industrial property, to which Romania is a member. According to the principle adopted by the Paris Convention, the foreigner, as a national of the European Union enjoys the advantages granted by the other countries of the Union to their nationals as regards the protection of his trademarks.

- the *international* way – underlain by the „Madrid Agreement” or a Protocol relating thereto. The application shall be submitted to the Office in the home country which, in turn, shall send it to the World Intellectual Property Organisation where the examinations for all Offices are being carried out. Then the applications are sent to the Offices in the countries chosen for registration where a basic examination shall be carried out;

- the *Community* trademark – in this case, a single file and a single examination are carried out and the protection is guaranteed in all the countries of the European Union.

Starting with Romania's accession to EU and the entry into force of the Community trademark legislation, some trademarks and patents registered with SOIT shall be cancelled because those having identical names with trademarks and patents issued in a Community country shall be evaluated according to the primacy principle (the first issued shall be retained whereas the other one shall be cancelled). Some Romanian trademarks registered with SOIT shall be cancelled since some trademarks have been issued without consideration for the fact that another trademark having the same name could exist in a EU member state.

For instance, „Arctic” and „Altex” are among the most popular Romanian trademarks. After the accession to the EU, they are likely to remain just some names only locally recognised because, at European level, these trademarks have already been registered. In the database of the European Trademark Office the name „Altex” has been taken over twice: by a firm in the Czech Republic which produces antitheft devices and by a French producer of textile colorants. Another well-known name in Romania, „Logan”, is on the list of registered trademarks: although produced at Mioveni, the trade belongs exclusively to the French of Renault.

Over 600000 trademarks registered in the European Community shall invade the Romanian market after accession. The flow of Romanian trademarks, already registered in the EU countries, shall by no means be as high. Among trademarks registered at European level are: „Dacia”, „Ursus”, „Jolidon”, „Oltchim”, Intelmark”, Gerovital Cosmetics”.

**Romanian brands prepare themselves to duel:** In June 2006, the company Oltchim Râmnicu Vâlcea requested The Office of Harmonization for the Internal Market (OHIM), the authority that brings under regulation the industrial property field in UE, to register the tinned food Râureni name as Community trademark. Therefore, the name under which the Oltchim cannery products are marketed will become a trademark in all EU countries starting with 1 January 2007. Put it otherwise, the Râureni brand will be protected in 27 countries.

Starting with this year, Romania adopts the Community brands system. Thus, the 200.000 national brands registered at the Romanian State Office for Inventions and TradeMarks (OSIM) will enter the competition (and even conflict) with the 600.000 existing brands in UE. According to the OSIM representatives, opening “gates” for Community trademarks will have two immediate consequences on the Romanian market. The first effect: disputes will certainly arise between the holders of similar marks. Ștefan Cocoș, head of the OSIM brand department, confirms: “Romania adoption of the Community trademark system will lead to conflicts between the holders of national brands and those of Community trademarks, conflicts which will be solved in court.” According to the OSIM official representative, the second effect will be the difficult registration procedure of a new brand, „because it will have to be different from the 800,000 national brands and Community trademarks that already exist.”

With respect to the disputes at law, lawyers argue that the holders of Community trademarks enjoy a greater protection. „If the mark of the Community is «older», then its owner may ask the court to annul the competing national brand. Instead, if the national brand is «older», its owner may require the court to forbid the use of the Community trademark in Romania”, says Eduard Pavel, intellectual property lawyer at Rominvent. Thus, the owner of the Community trademark may request the cancellation of a national brand, while the owner of the national brand may only request the Community trademark interdiction on the local market. A Community trademark registration costs 12,000 euros.

Protecting the brand in the Community will require new costs. If for the registration of a brand in Romania, fees vary between 150 and 2,000 euros, for a Community trademark registration, fees are between 1,600 and 12,000 euros.

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Besides trademarks, Romania and the EU ensure protection for traditional products' names. „The application for the certification of a geographical name is done at the request of the producers in that area. If they obtain the certificate, no other producer outside of that area will be allowed to use the geographical indication in the name of the products they market”, explains Tudorel Baltă, adviser to the Ministry of Agriculture. For example, currently, the Rucăr cheese is produced in several areas of the country. After accession, if producers in the Rucăr region will require the product certification as traditional to their area, then only they will be able to use the Rucăr geographical indication in the name of this product. Thus, after Romania's EU accession, the registration of a brand or of a name that contains a geographical indication will be the first step to protect a business in a very competitive environment.

#### **Case study – Registration of a international protected brand, at national level, in bad faith**

By the application initiating legal proceedings, the plaintiff SIN, in contention with XY Ltd. and O.S.I.M., asked the cancellation of the registration of STALINSKAYA brand belonging to the defendant, accomplished in bad-faith as well as the ordering to the said defendant to de-register the respective brand.

The Appeal Court of Bucharest accepts the plaintiff's action and adopts the cancellation of the STALINSKAYA brand; it orders the O.S.I.M. defendant to de-register the STALINSKAYA brand from the National Register of Brands.

In order to rule this decision, The Court has retained the following:

- The plaintiff is the right-holder of the STALINSKAYA RUSSIAN VODKA brand, internationally registered by means of the Madrid Agreement of January 21<sup>st</sup> 1991, in which Romania is also an approved state.

- The defendant has submitted on 8 february 1996 an application to nationally register the STALINSKAYA brand, and the registration certificate was issued on 13 november 1997, for the class 33- Industrial and Natural Alcohol Drinks;

- The two brands are almost identical generating confusion among consumers;

- The plaintiff accuses the defendant of bad faith at the registration of the STALINSKAYA brand as the latter tried to appropriate an important segment of the plaintiff's customers as well as the fact that the defendant has tried beforehand to register some notorious brands (Beefeater), being sanctioned by judicial decision not to use them.

Examining the case in substance, the Court retains the following:

- In compliance with the Law No. 84 of 1998 on brands and geographical Indications, the signs meant to mislead the public in relation to product quality (art. 5) are excluded from protection and cannot be registered. The same holds true for signs that are similar to a previous brand meant to be applied to some similar or identical products, if there is a confusion risk for the public, a risk of association with a previous brand being included;

- In the present case, one retains the similarity between the defendant's brand and the claimant's one, derived from the STALINSKAYA name which constitutes the

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entire brand of the defendant and part of the plaintiff's brand STALINSKAYA RUSSIAN VODKA;

- The registration of the brand by the defendant, having a name with sonority extremely similar to the first brand, the latter being well-known and enjoying a well-rooted tradition, excludes the intention of good faith. In compliance with art. 1203 of the Civil Code, one can assert that the defendant intended to make use of the STALINSKAYA brand name, for the notoriety that the brand name enjoys, in order to mislead the unwary public. Furthermore, the Court holds as argument for the defendant's bad faith the fact that the defendant acted similarly with the BEEFEATER brand, registration which had been cancelled by another judicial decision;

- The Court decides that the above-mentioned arguments amount to fraudulent intention or bad-faith.

The Court, retaining that the new brand registered by the defendant with the O.S.I.M. has been obtained by infringement of the law:

- grants the plaintiff's action;
- decides the cancellation of the STALINSKAYA brand and
- orders the defendant O.S.I.M. to de-register the STALINSKAYA brand from the National Register of Brands.

(The Appeal Court of Bucharest—the Civil third section, Civil Decision no. 155A of May 25, 2002)

**In conclusion**, two brand registration systems shall co-exist in Romania: the national trademarks system (run by the Romanian State Office for Inventions and TradeMarks) and the Community brands system (run by OHIM, as European office). Therefore, managers should allow for the integration of the Community trademark in the strategy of each company and consider trademarks as a valuable asset which, in turn, can be sold or bought.

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